INDEX

	Page
Opinions below	1
Jurisdiction	1
Questions presented	2
Statute and other authorities involved	2
Statement	2
Summary of Argument	7
Argument:	
I. The dealings by petitioner in its own shares produced income under Section 22 (a) of the Revenue Act of 1932. Article 66 of Regulations 77, as amended in 1934, treats the gain on such transactions as income and there is no reason to deny application to the regulations as amended	8
II. Petitioner's transactions in its own stock were within the scope of the regulations as amended	9
III. The gain was not realized and taxable in 1931, the year of purchase	12
IV. The petitioner's view, and not the Government's, leads to anomalous results	14
Conclusion	18
Appendix	19

CITATIONS

Cases:	
Commissioner of Internal Revenue v. *S. A. Woods Machine Co.*, 57 F. (2d) 635	16
Eyster v. *Centennial Board of Finance*, 94 U. S. 500	13
Helvering v. *R. J. Reynolds Tobacco Co.*, No. 328, October Term, 1938	7, 9
United States v. *Kirby Lumber Co.*, 284 U. S. 1	13, 16
United States v. *Phellis*, 257 U. S. 156	14
Statutes:	
Revenue Act of 1928, c. 852, 45 Stat. 791, Sec. 605 (U. S. C., Title 26, Sec. 1691)	19
Revenue Act of 1932, c. 209, 47 Stat. 169, Sec. 22	19
Miscellaneous:	
T. D. 4430, XIII–1 Cumulative Bulletin 36	20
Treasury Regulations 77, Art. 66	20

114491—38——1

In the Supreme Court of the United States

OCTOBER TERM, 1938

No. 385

FIRST CHEROLD CORPORATION, PETITIONER

v.

GUY T. HELVERING, COMMISSIONER OF INTERNAL REVENUE

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE RESPONDENT

OPINIONS BELOW

The opinion of the United States Board of Tax Appeals (R. 16) is a memorandum opinion and therefore not officially reported. The opinion of the Circuit Court of Appeals (R. 33) is reported in 97 F. (2d) 22.

JURISDICTION

The judgment of the Circuit Court of Appeals was entered on May 26, 1938 (R. 36). A petition for rehearing was denied on June 28, 1938 (R. 47).

A "Supplemental Petition for Rehearing" was filed on July 14, 1938, which, as far as we are able to ascertain, has not yet been entertained or acted upon. The petition for certiorari was filed on September 27, 1938, and granted November 7, 1938 (R. 48). The jurisdiction of this Court rests on Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTIONS PRESENTED

Petitioner in 1931, 1932, and 1933 purchased and sold shares of its own stock. In 1933, the year in question, petitioner sold for $92,593.05 662 such shares which had been purchased by it in 1931 for $64,648.40.

1. May the difference between the cost of the shares and the proceeds on sale be included in petitioner's income for 1933 under Section 22 (a) of the Revenue Act of 1932?

2. Does Article 66 of Regulations 77, as amended in 1934, apply to petitioner's transactions in its shares; and if so, must the Regulation be denied application?

STATUTE AND OTHER AUTHORITIES INVOLVED

The statute and other authorities involved will be found in the Appendix, *infra,* pp. 19–22.

STATEMENT

The facts, as stipulated, for the most part, and as found by the Board of Tax Appeals (R. 16–20) are in substance as follows:

The taxpayer is a Delaware corporation organized April 8, 1930, for the purpose of speculating in listed stocks. In the course of its business the taxpayer never owned stocks that were not listed on the Exchange. During the taxable year the taxpayer had authorized capital stock of 10,000 shares, of which 5,748 were issued at approximately $100 per share (R. 16–17).

Mr. Gerald M. Loeb, a partner of E. F. Hutton & Company, of New York City, managed the taxpayer from the time of its organization through the taxable year. The original subscribers for the taxpayer's stock were some 60 or 70 friends of Mr. Loeb, who were promised at the time the stock was issued that the corporation would repurchase the stock if they wished to sell it, and if financial conditions permitted. The stock of the taxpayer was not listed on any stock exchange (R. 17).

The taxpayer made the following purchases and sales of its own stock during the period from 1931 to 1933, inclusive (R. 18–19):

1931				1931			
Date	Purchases		Cost	Date	Sales		Proceeds
	Shs.	Price			Shs.	Price	
Feb. 16	60	114	$6,884.00	Feb. 20	25	114¾	$2,869.38
Mar. 30	100	111¼	11,125.00	Feb. 24	35	116	4,060.85
Apr. 14	50	111¼	5,562.50	Mar. 31	50	113	5,635.00
Apr. 20	100 Cash	110	11,025.00	Apr. 2	10	113	1,126.60
May 6	40	103	5,412.50	Apr. 16	90	111¾	10,051.40
Aug. 4	100	103¾	10,100.00		210 shs.		
Aug. 26	50	96	4,810.00				
Aug. 27	50	96	4,810.00				
Sept. 21	136	96	13,063.20				
Sept. 30	50	96	4,810.00				
Oct. 6	250 Cash	98	24,500.00				
Oct. 6	150 Cash	98	14,700.00				
Oct. 8	150 Cash	98	14,700.00				
Oct. 21	50	98	4,910.00				
Oct. 28	10	98	983.05				
Nov. 10	350 Cash	100	35,062.50				
Nov. 13	50	100	5,012.50				
Dec. 10	25 Cash	105¾	2,600.00				
Dec. 11	5	102	513.00				
	1,686 shs.						

	Shares
Total Purchases	1,686
Less Total Sales	210
Shs. held at end of 1931	1,476

1932				1932			
Date	Purchases		Cost	Date	Sales		Proceeds
	Shs.	Price			Shs.	Price	
Feb. 29	146	105½	$15,439.00	Jan. 12	10	105¾	$1,064.10
May 11	34	105¼	2,532.00	Dec. 7	200	118.98	23,728.00
May 19	450	102	46,012.50				
June 21	10	108	1,063.00				
July 5	10	108	1,063.00				
	640 shs.						

	Shares
Total Purchases	640
Less Total Sales	210
	430
Balance at end of 1931	1,476
Plus purchases in 1932	640
	2,116
Less sales in 1932	210
Balance at end of 1932	1,906

1933				1933			
Date	Purchases		Cost	Date	Sales		Proceeds
	Shs.	Price			Shs.	Price	
				Feb. 23	20	117	$2,333.20
				May 3	5	122	656.55
				May 5	25	133½	3,329.60
				May [illegible]	50	133½	6,665.00
				May 9	40	134	5,346.60
				May 11	25	131¾	3,288.38
				May 15	25	131	3,266.50
				May 22	40	129	5,146.40
				June 9	10	142	1,416.10
				June 9	50	142	7,083.00
				June 9	25	144	3,591.50
				July 12	50	146	7,283.00
				Aug. 31	65	146	9,457.90
				Sept. 1	3	146¾	436.98
				Sept. 6	2	145½	287.82
				Sept. 18	10	150¼	1,498.60
				Sept. [illegible]	100	145	14,466.00
				Oct. 25	4	147	584.64
				Nov. 21	86	146	12,536.78
				Dec. 4	17	143	2,425.22
				Dec. 19	10	150½	1,501.10
				Shs. Sold	662		

	Shares
Balance at end of 1932	1,006
Less Sales in 1933	662
Balance at end of 1933	1,344

The taxpayer, during 1933, sold 662 shares of its own capital stock at a total selling price of $92,593.05. The Commissioner, in determining the deficiencies asserted, determined that these 662 shares of stock sold by the taxpayer during 1933 for $92,593.05 were acquired by the taxpayer during 1931 at a cost of $64,648.40 and accordingly added to income the difference of $27,944.65. The taxpayer admits that it did purchase 662 shares of its own capital stock in 1931 and sold the same number of shares in 1933 for the sums above mentioned.

The purchases and sales of the stock were made on the basis of liquidating value, plus or minus a marginal difference to take care of inaccuracies (R. 20).

When the taxpayer purchased the shares of its own stock they were charged to an account designated "Treasury Stock" in the amounts paid therefor, and they were carried as such on the liability side as a deduction from issued capital. Upon subsequent sales of shares of the stock this account was credited with the cost of the respective shares sold, and the excess of the amount received upon the sale of shares over the price at which an equal number of shares were purchased was credited to an account designated "Surplus From Sale of Treasury Stock" (R. 20).

No adjustment was made in the outstanding capital stock by reason of such purchases and sales, the matter being handled entirely by an increase or decrease in the treasury stock. Purchases of stock or securities other than shares of its own capital stock were carried in separate accounts designated "Speculative Long Position in Market" and "Investment Long Position in Market" (R. 20).

The Board determined that the taxpayer realized income in the amount of $27,944.65 from the sales of its stock in 1933, and accordingly assessed a deficiency of $3,909.21 in income tax and of $1,421.54 in excess profits tax (R. 23). The Circuit Court of Appeals affirmed the decision of the Board, holding that the gain derived by the tax-

payer from trading in its own stock during the taxable year represented taxable income in accordance with the provisions of the statute and the amended regulation (R. 33–35).

SUMMARY OF ARGUMENT

1. For the reasons stated in the Government's brief in *Helvering* v. *R. J. Reynolds Tobacco Co.*, No. 328, present term, the dealings by petitioner in its own shares gave rise to income in the amount of the difference between the cost of the shares to it and the proceeds on sale; and there is no reason to deny application to Regulations 77, Article 66, as amended in 1934.

2. Petitioner's transactions in its own stock were dealings in its shares within the scope of the Regulations as amended. Both the Board and the court below so determined. The purchases and sales were extensive in relation to the number of issued shares, and there was no alteration in the capital structure of petitioner.

3. Gain was realized in 1933, when the shares were sold, not in 1931 when they were purchased for less than their issuing price. Until the sales there was no closed transaction. The analogy to the redemption of bonds at a discount is not apposite.

4. The result contended for by the Government does not produce absurd consequences. The result is simply to tax gains or allow a deduction for losses when realized. Petitioner's view, on the

other hand, would open the door to tax evasion by use of a corporation's own stock in lieu of cash or other property.

ARGUMENT

I

THE DEALINGS BY PETITIONER IN ITS OWN SHARES PRODUCED INCOME UNDER SECTION 22 (A) OF THE REVENUE ACT OF 1932. ARTICLE 66 OF REGULATIONS 77, AS AMENDED IN 1934, TREATS THE GAIN ON SUCH TRANSACTIONS AS INCOME AND THERE IS NO REASON TO DENY APPLICATION TO THE REGULATIONS AS AMENDED

Petitioner, which was organized in 1930 for the purpose of speculating in listed stock, had an authorized capital of 10,000 shares, of which 5,748 were issued (R. 16, 17). The original subscribers, 60 or 70 in number, were promised that the corporation would repurchase their stock "if they wished to sell it, and if financial conditions permitted" (R. 17). The stock was not listed on any exchange (*ibid.*).

During 1931, 1932, and 1933 petitioner made purchases and sales of its shares which were extensive in comparison with its outstanding stock. The purchases and sales were made at approximately the liquidating value of the shares (R. 20). In 1931 petitioner purchased 1,686 shares and sold 210; in 1932 it purchased 640 shares and sold 210; in 1933 it thus had on hand 1,906 shares previously purchased. Of these it sold, in 1933, 662 shares,

the proceeds exceeding the cost of the shares to it by $27,944.65. It is this amount that the Commissioner, the Board of Tax Appeals and the court below determined to be includible in petitioner's income for 1933.

The basic questions involved are discussed in the Government's brief in *Helvering* v. *R. J. Reynolds Tobacco Co.*, No. 328, to be argued immediately preceding the present case. We have there sought to show that gains derived by a corporation from the purchase and sale of its own shares are properly included within the statutory and constitutional concept of income, and that there is no reason to deny application to the Regulations, as amended in 1934, which provide that a corporation realizes gain or loss when it deals in its own shares as it might in the shares of another corporation. The arguments in support of these propositions will not be repeated here, but reference to them in our brief in No. 328 is respectfully made.

II

PETITIONER'S TRANSACTIONS IN ITS OWN STOCK WERE WITHIN THE SCOPE OF THE REGULATIONS AS AMENDED

The contention is advanced by petitioner that its transactions in its own shares were not dealings in its own stock, and hence not within the scope of the amended Regulations (Pet. Br. 14–18). The pertinent portion of Article 66 of Regulations 77, as amended by T. D. 4430, *infra*, p. 20, reads as follows:

Acquisition or disposition by a corporation of its own capital stock.—Whether the acquisition or disposition by a corporation of shares of its own capital stock gives rise to taxable gain or deductible loss depends upon the real nature of the transaction, which is to be ascertained from all its facts and circumstances. The receipt by a corporation of the subscription price of shares of its capital stock upon their original issuance gives rise to neither taxable gain nor deductible loss, whether the subscription or issue price be in excess of, or less than, the par or stated value of such stock.

But where a corporation deals in its own shares as it might in the shares of another corporation, the resulting gain or loss is to be computed in the same manner as though the corporation were dealing in the shares of another.

It will be observed that the Regulations contrast two kinds of transactions: the issuance of new stock to subscribers, and the dealing in a corporation's own shares as it might in the shares of another. In the present case the stock was bought and sold by petitioner as it might buy and sell any unlisted shares. No change was made in the capital structure of petitioner. The gain on sales was carried on its books as "surplus from sale of Treasury stock." These were not isolated transactions. The relative number of shares dealt in is impressive. The purchases in 1931 and 1932 ag-

gregated more than 40 per cent of the petitioner's issued stock, and the number of shares sold in 1933 exceeded one-ninth of the issued stock. These facts, it is submitted, indicate clearly that petitioner was dealing in its own shares.

It is of no significance that the purchases of shares by petitioner were made pursuant to an informal agreement to do so if a shareholder requested and if financial conditions permitted. The decisive fact is that in buying and selling its shares the corporate structure was not changed. Petitioner apparently had no intention to, and admittedly did not, reduce its capital stock when it purchased the shares or increase its capital stock when it sold the shares. The circumstances that only purchases of its own shares would satisfy the antecedent agreement with stockholders may explain the decision to purchase the shares, but does not alter the conclusion that the corporation in buying and selling was dealing in its shares. A corporation with heavy investments in the shares of another corporation may decide to support the stock of that other corporation by purchases; only that stock will satisfy this purpose, and yet the dealings in it would not take on a unique character for that reason.

The Board and the court below determined that the petitioner was dealing in its own stock as it might in the shares of another corporation. The Board stated that this was the sole issue in the case

(R. 16). The Board stated also that the question presented under the applicable statute and Regulations is whether the taxpayer is dealing in its own shares as it might in the shares of another corporation, that the taxpayer denies that it was so dealing, and that the Board is of opinion that the position of the taxpayer is untenable (R. 21). The petitioner, in its assignment of errors in the court below, asserted that there was no evidence to support the holding of the Board that the petitioner was dealing in its own shares of stock (R. 26). The court below said (R. 34) that "corporations do so deal in their own stocks by buying and selling as they buy and sell other property, and this corporation did that very thing here."

III

THE GAIN WAS NOT REALIZED AND TAXABLE IN 1931, THE YEAR OF PURCHASE

It is contended also by petitioner that if any gain or loss was derived by it from its transactions in its own shares, the gain or loss arose in 1931 when petitioner purchased the stock (Pet. Br. 18–20). This contention, it is submitted, is without merit.

In 1931 the shares here in question were purchased by petitioner, but were neither retired nor sold in that year. If they had been retired, there would have been a change in the capital structure, and under traditional practice in the taxation of corporations the increment from the purchase of

the shares at less than their issuing price would be treated merely as gain to the remaining stockholders, not yet realized, however, by them. But where the stock is not retired, the transaction is not closed until the stock is sold, and the gain is then realized by and taxable to the corporate entity itself, since the number and nature of the shareholding accounts is precisely the same after the sale as they were before the purchase, while the cash in the hands of the corporation has been increased by the transactions.

The analogy sought to be drawn by petitioner to the case of *United States* v. *Kirby Lumber Co.*, 284 U. S. 1, is not apposite. That case held that a corporation buying in its bonds at less than the issuing price realizes income in the amount of the difference. Capital stock, though carried on the liability side of the ledger, is not, like bonds, a debt of the corporation. *Eyster* v. *Centennial Board of Finance*, 94 U. S. 500, 502. In the case of the purchase by a corporation of its stock there is no discharge of a fixed obligation. Where the stock is bought with the object of resale rather than retirement the analogy is even more remote. In such a situation, which obtains in the present case, the ordinary principle is applicable that gain is realized upon sale rather than upon purchase. The Treasury has not sought to tax as income the difference between the issuing price and the repurchase price of shares.

IV

THE PETITIONER'S VIEW, AND NOT THE GOVERNMENT'S, LEADS TO ANOMALOUS RESULTS

It is finally contended by petitioner that "absurd results" would follow if the Government's contentions were adopted (Pet. Br. 20–21). The hypothetical cases put by petitioner do not reveal any absurdities. The first two cases suggested involve a sale by the corporation of its own shares where between the purchase and sale the value of the shares has been increased or decreased by capital contributions or distributions. The controlling fact in such cases is that gain or loss, as the case may be, is realized by the corporation upon the sale of the shares; it is unimportant whether the gain or loss attributable to the enhanced or diminished value of the shares may be ascribed to capital contributions or distributions, or to some other events in the operations of the business. It is not the increase or decrease in capital which is recognized for tax purposes, but the gain or loss derived in a realizing transaction. Under petitioner's theory, it would be absurd to tax a stockholder on a cash dividend where his net wealth consisting of dividends plus his interest in the assets of the corporation is no greater on receipt of the dividend than his interest in the assets was theretofore. Yet it is settled that dividends are taxable without regard to such circumstances. *United States* v. *Phellis*, 257 U. S. 156, 171.

The cases next suggested by petitioner are those in which a corporation would be taxed on its ordinary earnings and also on the gain from the sale of its own shares, the value of which had been enhanced by those earnings; and, conversely, the cases of two deductions for losses. There is nothing unusual in those situations. Again the controlling fact is that there have been two realizing transactions during the taxable year. The situation is not different from the case of an individual who derives gains from the earnings of his business during the year, on which he is taxed, and who sells the business during the same year at a consequent profit, on which he is also taxed.

The final case suggested by petitioner is that of a corporation selling treasury shares at a loss in order to create a deduction for tax purposes. And it is suggested that a corporation could avoid a gain on the sale of its treasury stock by amending its charter and recapitalizing. It should not be an argument against the Commissioner's position that it will redound to the benefit of taxpayers as well as to the benefit of the Government. Moreover, if the corporation does amend its charter its treatment of its own shares is substantially different than if it buys and sells them without regard to the requirements and limitations imposed by statute and charter on the retirement of shares and the issuance of new shares.

In fact, it is petitioner's position that leads to anomalous results. A corporation whose shares have a ready market could take advantage of a rising market without liability for income tax by choosing to buy and sell its own shares rather than the shares of another readily marketable stock. There would also be opened up an apparent opportunity for tax evasion in connection with the discharge of corporate obligations. Consider, for example, the case of a corporation having an opportunity to discharge an indebtedness of $1,000 for $900. If cash or property is used to do so, gain will result to the corporation in the amount of $100, under the rule in the *Kirby* case, *supra*. But under petitioner's theory, it would presumably be open to the corporation to buy its own shares at $900 and use them to discharge the liability without having to report the difference as taxable gain. Indeed, if the corporation had purchased shares of its own at less than their present value, the gain on the discharge of the obligation by use of those shares would be even greater, and yet no taxable income whatever would result under the theory of petitioner.

The possibility of using a corporation's own shares to defeat tax liability was a factor in the decision in *Commissioner of Internal Revenue* v. *S. A. Woods Machine Co.*, 57 F. (2d) 635 (C.

C. A. 1st). Its own stock was taken by the corporation in settlement of a decree for patent infringement. The court pointed out that the transaction should be considered for tax purposes just as if the corporation received cash instead of its own stock. The court said (p. 636):

> The transaction involved in this case was equivalent to the payment of the debt in cash and the investment of the proceeds by the corporation in its own stock. If that had been done clearly the cash received would have been taxable income. The transaction was not changed in its essential character by the fact that, as the debtor happened also to own the stock, the money payment and the purchase of stock were bypassed, and the stock was directly transferred in payment of the debt. The stock was the medium in which the debt was paid. The wide door to evasion of taxes opened by the decision of the Board is an additional reason, and a weighty one, against it.

It is submitted that whether stock is taken by the corporation in discharge of an obligation to it, or used by the corporation to discharge an obligation owed by it, or bought and sold for cash, the realities of the situation require that the transaction be treated in the same way as where the shares of another corporation are employed.

CONCLUSION

For the foregoing reasons the judgment of the court below should be affirmed.

Respectfully submitted.

ROBERT H. JACKSON,
Solicitor General.
JAMES W. MORRIS,
Assistant Attorney General.
SEWALL KEY,
PAUL A. FREUND,
MORTON K. ROTHSCHILD,
Special Assistants to the Attorney General.

DECEMBER 1938.

APPENDIX

STATUTE AND OTHER AUTHORITIES INVOLVED

Revenue Act of 1928, c. 852, 45 Stat. 791:

> SEC. 605. RETROACTIVE REGULATIONS.
>
> Section 1108 (a) of the Revenue Act of 1926 is amended to read as follows:
>
> "SEC. 1108. (a) In case a regulation or Treasury decision relating to the internal-revenue laws is amended by a subsequent regulation or Treasury decision, made by the Secretary or by the Commissioner with the approval of the Secretary, such subsequent regulation or Treasury decision may, with the approval of the Secretary, be applied without retroactive effect". (U. S. C., Title 26, Sec. 1691.)

Revenue Act of 1932, c. 209, 47 Stat. 169:

> SEC. 22. GROSS INCOME.
>
> (a) *General Definition.*—"Gross income" includes gains, profits, and income derived from salaries, wages, or compensation for personal service, of whatever kind and in whatever form paid, or from professions, vocations, trades, businesses, commerce, or sales, or dealings in property, whether real or personal, growing out of the ownership or use of or interest in such property; also from interest, rent, dividends, securities, or the transaction of any business carried on for gain or profit, or gains or profits and income derived from any source whatever. * * *
>
> * * * * * *

Treasury Regulations 77, relating to the Revenue Act of 1932:

> ART. 66. *Sale by corporation of its capital stock.*—The proceeds from the original sale by a corporation of its shares of capital stock, whether such proceeds are in excess of or less than the par value of the stock issued, constitute the capital of the company. If the stock is sold at a premium, the premium is not income. Likewise, if the stock is sold at a discount, the amount of the discount is not a loss deductible from gross income. If, for the purpose of enabling a corporation to secure working capital or for any other purpose, the shareholders donate or return to the corporation to be resold by it certain shares of stock of the company previously issued to them, or if the corporation purchases any of its stock and holds it as treasury stock, the sale of such stock will be considered a capital transaction and the proceeds of such sale will be treated as capital and will not constitute income of the corporation. A corporation realizes no gain or loss from the purchase or sale of its own stock. (See article 176.)

Treasury Decision 4430, approved May 2, 1934, XIII–1 Cumulative Bulletin 36:

> ARTICLE 66: Sale by corporation of its capital stock. — XIII–20–6792 T. D. 4430
>
> (Also Section 23 (i), Article 176.)
>
> INCOME TAX
>
> Acquisition or disposition by a corporation of its own capital stock.
>
> Articles 543 and 563, Regulations 65 and 69, and articles 66 and 176, Regulations 74 and 77, amended.

TREASURY DEPARTMENT,
OFFICE OF COMMISSIONER
OF INTERNAL REVENUE,
Washington, D. C.

To Collectors of Internal Revenue and Others Concerned:

Articles 543 of Regulations 65, approved October 6, 1924, and Regulations 69, approved August 28, 1926, and articles 66 of Regulations 74, approved February 15, 1929, and Regulations 77, approved February 10, 1933, are hereby amended to read as follows:

Acquisition or disposition by a corporation of its own capital stock.—Whether the acquisition or disposition by a corporation of shares of its own capital stock gives rise to taxable gain or deductible loss depends upon the real nature of the transaction, which is to be ascertained from all its facts and circumstances. The receipt by a corporation of the subscription price of shares of its capital stock upon their original issuance gives rise to neither taxable gain nor deductible loss, whether the subscription or issue price be in excess of, or less than, the par or stated value of such stock.

But where a corporation deals in its own shares as it might in the shares of another corporation, the resulting gain or loss is to be computed in the same manner as though the corporation were dealing in the shares of another. So also if the corporation receives its own stock as consideration upon the sale of property by it, or in satisfaction of indebtedness to it, the gain or loss resulting is to be computed in the same manner as though the payment had been made in any other property. Any gain derived from such transactions is subject to tax, and any loss sustained is allowable as a deduction

where permitted by the provisions of applicable statutes.

Articles 563 of Regulations 65, approved October 6, 1924, and Regulations 69, approved August 28, 1926, are hereby amended by striking out the first and second sentences thereof, by substituting the words "a corporation" in place of the second word in the third sentences of those articles, and by adding the following sentence to those articles:

As to the acquisition or disposition by a corporation of its own capital stock, see article 543.

Article 176 of Regulations 74, approved February 15, 1929, is hereby amended by omitting the first and second sentences thereof, by substituting the words "a corporation" in place of the second word in the third sentence of this article, and by adding the following sentence to this article:

As to the acquisition or disposition by a corporation of its own capital stock, see article 66.

Article 176 of Regulations 77, approved February 10, 1933, is hereby amended by omitting the first and second sentences thereof, and by adding the following sentence to this article:

As to the acquisition or disposition by a corporation of its own capital stock, see article 66.

GUY T. HELVERING,
Commissioner of Internal Revenue.

Approved May 2, 1934.

H. MORGENTHAU, Jr.,
Secretary of the Treasury.

U. S. GOVERNMENT PRINTING OFFICE: 1934

SUPREME COURT OF THE UNITED STATES.

No. 385.—October Term, 1938.

First Chrold Corporation, Petitioner,
vs.
Commissioner of Internal Revenue.

On Writ of Certiorari to the United States Circuit Court of Appeals for the Third Circuit.

[January 30, 1939.]

Mr. Justice Roberts delivered the opinion of the Court.

This case presents the same question as that involved in No. 328, decided this day. Certiorari was granted because of a conflict in the decisions below. The statutory provision under which this case arises is Section 22(a) of the Revenue Act of 1932, which is the same as the corresponding section of the Revenue Act of 1928. The regulations, original and amended, have the same relation to this controversy as to that in No. 328. The Board of Tax Appeals sustained a determination of a deficiency in the petitioner's tax for the calendar year 1933 and the Circuit Court of Appeals affirmed the Board's ruling.[1]

For the reasons given in No. 328 the judgment must be

Reversed.

A true copy.

Test:

Clerk, Supreme Court, U. S.

[1] 97 F. (2d) 22.